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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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January 14, 1994

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BY HAND

William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

**Re: In the Matter of Policies and Rules
Concerning Toll Fraud, No. 93-292**

Dear Mr. Caton:

Enclosed herewith is an original and four copies of the Comments of FMC Corporation in the above-captioned matter for filing with the Commission. I also enclose an extra copy to be file-stamped and returned to me.

Sincerely,


James P. Gillespie

JPG:djd
Enclosures

cc: J. Ethan Jacobs, Esq. (w/encl.)

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
Policies and Rules
concerning Toll Fraud

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CC Docket No. 93-292

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF FMC CORPORATION

FMC Corporation (FMC), a victim of remote access PBX toll fraud,¹ respectfully submits these comments on the Commission's Notice of Proposed Rulemaking in the above-captioned matter. Notice of Proposed Rulemaking, CC Docket No. 93-292 (rel. December 2, 1993).

FMC supports the Commission's determination that tariff liability provisions fail to recognize carriers' obligations to affirmatively warn consumers of the dangers of toll fraud and that equipment manufacturers and servicers also have an inherent obligation to warn consumers of the risks of fraud associated with the equipment. FMC also urges the Commission to consider, as an initial matter, whether existing tariffs permit AT&T to bill a PBX customer for fraudulent remote access toll calls.

I.

As a threshold matter, FMC requests that the Commission consider whether currently effective tariffs (in FMC's case, AT&T FCC Tariff No. 1) permit a carrier to recover for unauthorized toll calls that are placed from a location other than the customer's number. AT&T FCC Tariff No. 1 provides, in relevant part, that a

¹ AT&T has filed suit against FMC to recover \$151,808 in toll charges occasioned by fraudulent remote access of FMC's AT&T-provided and maintained PBX. American Tel. & Tel. Co. v. FMC Corporation, No. LR-C-91-109 (E.D. Ark.).

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customer is only liable for services that "originate at the Customer's number(s)" or are "incurred at the specific request of the Customer." Unauthorized calls placed from remote locations cannot be held to originate at the customer's number. See, e.g., National Ass'n of Regulatory Util. Commr's, 776 F.2d 1492, 1498 (D.C. Cir. 1984) (physical location of origination and termination of a call determines its jurisdictional nature).² FMC has addressed this issue more fully in its Reply Comments in the Pacific Mutual proceeding (attached hereto as Exhibit A), which it incorporates herein by reference.

If the Commission does not adopt FMC's position on the origination issue, FMC would support the Commission's proposal to apportion liability among carriers, equipment manufacturers and servicers, and consumers. FMC believes that the comparative negligence theory of apportionment proposed by Pacific Mutual and others merits serious consideration. FMC's case is instructive. FMC's carrier (AT&T) and its equipment manufacturer and servicer (AT&T) failed to provide FMC any written notice of the dangers of remote access toll fraud.³ FMC followed AT&T's instructions for operating the PBX (including security procedures, which obviously were inadequate to prevent the fraud), and contracted for AT&T maintenance of the system (specifically including a service call


² The "origination" issue has not been reviewed by the FCC. In Chartways Technologies, Inc. v. AT&T Communications, 6 FCC Rcd 2952 (1991), the parties stipulated that the disputed calls "originated" from Chartways' number. Id. at 2954 ¶ 13.


³ It is a matter of factual dispute as to whether AT&T provided FMC with oral notice of the risks of remote access toll fraud. FMC maintains AT&T provided no such notice.

where the fraudulent calls were actually being made but not detected by AT&T). At all times AT&T was acutely aware of the risks of remote access toll fraud. Yet at no time did AT&T do anything to prevent, or instruct FMC on ways to prevent, remote access toll fraud. Despite following AT&T's instructions and relying on AT&T to service the PBX, FMC was victimized by over \$150,000 in fraudulent toll charges -- which AT&T seeks to have FMC pay.

Respectfully submitted,

FMC Corporation


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Its Attorneys

January 14, 1994

Exhibit A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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SECRETARY

In the Matter of)
)
Pacific Mutual Insurance) ENF 91-07
Company Petition for)
Declaratory Ruling)

REPLY COMMENTS OF
FMC CORPORATION

FMC Corporation (FMC), a victim of remote access toll fraud,¹ respectfully files these reply comments in response to the various comments filed at the Commission's invitation. Public Notice, DA-91-284 (rel. March 14, 1991). FMC endorses the basic position of those commenters who argue that AT&T's tariffs do not require a PBX subscriber to pay for unauthorized toll calls occasioned by remote access toll fraud.

Nevertheless, should the Commission adopt AT&T's position on the reading of its tariffs or as a matter of policy, FMC urges the Commission to make an exception to that policy where the interexchange carrier also provides the PBX which was fraudulently accessed. Where, for example, AT&T provides both the interexchange service and the PBX, the customer is at AT&T's mercy with respect to security against toll fraud. Therefore, AT&T, not its customer, should bear the burden of any losses occasioned by the toll fraud.

1. AT&T has filed suit against FMC to recover \$151,808 in toll charges occasioned by fraudulent remote access of FMC's AT&T-provided and maintained PBX. *American Tel. & Tel. Co. v. FMC Corporation*, No. LR-C-91-109 (E.D. Ark.).

I.

The parties raise two general issues in their comments: (1) AT&T's right to bill a PBX customer for fraudulent toll calls under existing tariffs, and (2) who, as a matter of policy, should bear the burden of remote access toll fraud. As to the first issue, AT&T's tariffs (other than its Tariff No. 12) do not clearly require PBX customers to pay toll charges that were unauthorized and occasioned by remote access.² As ambiguous tariffs are to be construed against the carrier, and other tariffs (both AT&T's Tariff No. 12 and MCI's tariff) expressly require payment for charges even though unauthorized,³ AT&T has no tariff/contractual right to compel PBX customers to pay toll charges incurred as a result of unauthorized remote access.

The policy issue appears more difficult,⁴ but is susceptible to a logical resolution. That resolution can be gleaned from Southwestern Bell's analogy -- "it is unfair to make all residents of a neighborhood pay for the burglary losses to a single home when that home is the only one on the block that leaves its doors unlocked." Southwestern Bell Comments

2. Perkin-Elmer Comments, Attached Complaint at 9-10; Metro-North Commuter Railroad Comments at 2; Chartways Technologies Comments, Attached Reply Brief (Attachment 2) at 6-7; NATA Comments at 4-5; Mitsubishi International Comments at 4-8.

3. See ARINC Comments at 4; Perkin-Elmer Comments, Attached Complaint at 11-13.

4. For discussion of the relevant policy issues see Securities Industries Association Comments at 7-9; NATA Comments at 7-11; Chartways Technologies Comments, Attached Brief (Attachment 1) at 12-13 and Reply Brief (Attachment 2) at 10-14.

at 5. At the outset, Southwestern Bell appears to suggest that requiring the neighbors to share in the loss would be reasonable if the doors of the burglarized home had been locked (that is, reasonable security precautions had been taken) -- and, in fact, the neighbors do share in the loss. It is called insurance.⁵

Moreover, if AT&T becomes the "insurer" (that is, the actual costs occasioned by remote access toll fraud are included in AT&T's cost of service), it has a powerful incentive to implement measures to deter and minimize toll fraud. That such incentives work is documented by several commenters in their discussion of how AT&T was able to reduce "credit card fraud" when federal regulations limited the liability of a calling card holder to \$50 for unauthorized use of his card.⁶

At the same time, of course, AT&T is correct that the customer also needs some incentive to prevent remote access toll fraud. It is unfair to require AT&T and its vigilant customers to bear the burden of fraudulent calls where the customer has been lackadaisical about security -- Southwestern Bell's unlocked house that is burglarized.

Accordingly, on balance, the guidelines proposed by the Securities Industries Association, et al. offer a solid basis

5. The Southwestern Bell analogy also suggests that the insurance company may have a claim against the burglarized homeowner for negligence if the house were indeed left unlocked.

6. See, e.g., Securities Industries Association Comments at 7-8; Perkin-Elmer Comments, Attached Complaint at 19-21; Chartways Technologies Comments, Attached Brief at 11-12.

for providing both carriers and customers the incentive to prevent remote access toll fraud and, when such fraud occurs, to equitably allocate the losses.⁷ FMC, therefore, urges the Commission to issue a notice of proposed rulemaking based on the Securities Industries Association proposal.

II.

If the Commission adopts AT&T's position (responsibility for fraudulent access of interexchange services should generally be borne by the PBX owner), it should also adopt an exception to that general rule. The exception is this: where the same company provides both the interexchange service and the PBX that was breached, that company -- and not the customer -- should bear the losses occasioned by remote access toll fraud unless the customer failed to use recommended security measures.

AT&T apparently would agree that exception is reasonable. In its comments, it states that the public interest requires that the financial burden occasioned by toll fraud should be placed "upon the party best able to prevent the fraud." AT&T Comments at 2. While AT&T nominates the PBX owner, it goes on to acknowledge that, in addition to the hacker, the responsible culprit may be the "PBX provider." AT&T Comments at 2-3.

In purchasing a PBX from AT&T and contracting for AT&T maintenance, FMC relied on AT&T's representations that its PBX

7. Securities Industries Association Comments at 10-12.

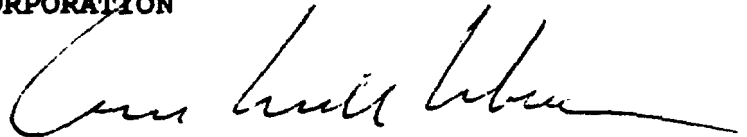
had security measures that would prevent remote access toll fraud. AT&T, which provides both toll services and the PBX to FMC, is in a far better position to prevent remote access toll fraud than FMC. Thus, applying AT&T's own standard, it should be held accountable for financial losses occasioned by fraud when it provides both the toll service and breached PBX.

Respectfully submitted,

FMC CORPORATION



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April 30, 1991